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In The

Supreme Court of the United States

JOANNE ARMSTRONG ALLNUTT,
Petitioner,

v.

ASSOCIATES LEASING, INCORPORATED;
MILLER & MILLER AUCTIONEERS, INCORPORATED;
URBAN N. ZINK CONTRACTORS, INCORPORATED;
MARK J. FRIEDMAN;
CHARLES J. MILLER, INCORPORATED,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in approving sale from individual's bankruptcy estate of property in which a co-owner (wife) had an interest, without compensation to the co-owner?

2. Did the Court of Appeals err in affirming without comment removal by bankruptcy court and imposition of sanctions, in case filed by counsel for wife, seeking a determination in state court of the issue of whether the client (wife of the Debtor) owned property in tenancy by the entirety that had been sold out of the husband's bankruptcy estate as husband's sole property?

3. Did the Court of Appeals err in affirming without comment the Bankruptcy Court's holding that the wife (spouse), despite the provisions of 11 U.S.C. § 363(h), (i) and (j), waived her interest in property held in tenancy by the entirety if she did not intervene in the bankruptcy court to claim that interest before the 30-day appeal period for the sale expired?

4. Did the Court of Appeals err when they affirmed without comment the Bankruptcy Court's denying subject matter jurisdiction of State Courts to resolve subsequent disputes of title to property, after it is sold out of the bankruptcy estate?

5. Did the Court of Appeals err when it affirmed without comment the bankruptcy court's holding that, since wife was an "insider", she was agent and "in privity" with the husband's litigation in or associated with his bankruptcy?

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PETITION FOR WRIT OF CERTIORARI

Tracy E. Mulligan, Esquire, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The Order of the Court of Appeals (App. 1) without separate opinion. The District Court issued a Memorandum (App. 4) and an Order (App. 7). The Bankruptcy Court issued a Memorandum Opinion Imposing Sanctions jointly against Plaintiff and Plaintiff's Counsel in the amount of $66,929.01 (App. 9), reported at 220 B.R. 871 (Bkrtcy, D.Md. 1998); Order Granting the Chapter 11 Trustee's Motion to Intervene, Denying Motions to Remand, Granting and Deferring Motions to Dismiss, and Imposing Sanctions against Plaintiff and Plaintiff's Counsel (App. 63); and a Permanent Injunction (App. 66). The Court of Appeals issued an Order denying Petition for Rehearing and Rehearing en Banc (App. 69).

JURISDICTION

The Court of Appeals entered its judgment on March 9, 1999. On April 6, 1999 it denied petitioner's request for rehearing (App. 69).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Constitutional provisions involved are set forth in the Appendix (App. 72). Statutory Provisions involved are set forth in App. 73-80. Attention is particularly directed to 11 U.S.C. Section 363(h), (i) and (j) (App. 79-80).

STATEMENT OF THE CASE

This petition is being filed by counsel for plaintiff below to reverse the award of sanctions affirmed and imposed by the Fourth Circuit Court of Appeals against him jointly with the plaintiff for allegedly filing a case without merit solely for harassment of the purchasers from the bankruptcy estate. The plaintiff herself is completely exhausted by sanctions and worry, and has instructed me not to proceed on her behalf.

On September 27, 1996, Counsel filed on behalf of Joanne A. Allnutt, in the Circuit Court for Howard County, Maryland, a complaint in conversion and detinue against asset purchasers and some of their transferees to obtain a decision on whether Joanne was the owner as tenant by the entireties of excavating equipment and related property sold out of the individual bankruptcy estate of her husband, Fred W. Allnutt, for the sum of $6,500,000.00. The question was whether the bankruptcy court's approved sale had lawfully or unlawfully swept her assets into payment of the husband's debt. The Chapter 11 Trustee had not complied with Title 11, §363(h), (i) and (j), and had paid no compensation to wife for her interest.

Defendants removed suit to bankruptcy court. Spouse moved to remand. Chapter 11 Trustee moved to intervene. Defendants moved to dismiss complaint and to impose sanctions on spouse and her counsel.

Plaintiff's counsel opposed the motions on the grounds, inter-alia, that the Court lacked subject matter jurisdiction, that sanctions are not authorized for counsel's filing a case in State Court that was removed to the bankruptcy court, as no new pleadings had been filed by plaintiff in Bankruptcy Court; and that the requirements for investigation of facts and legal research imposed by Rule 9019 had been fully met by counsel. It was also presented that the Trustee had failed to comply with 11 U.S.C. Sections 363 (h),(i) and (j) before conveying the property; and that

Plaintiff had never been made a party, or even called as a witness in the bankruptcy, as more fully stated under "Argument", infra.

After consolidating the 3 adversary proceedings (Defendants moved separately to remove) and hearing on motions, the Bankruptcy Court, James F. Schneider, J., held that

> 1. Bankruptcy court had subject matter jurisdiction over spouse's suit;
>
> 2. Complaint was properly removed from Maryland State Court;
>
> 3. Trustee, as representative of debtor's estate, was a necessary party and would be permitted to intervene;
>
> 4. Spouse's complaint was procedurally improper;
>
> 5. Court would permanently enjoin debtor, spouse, and their "insiders", agents, and attorneys from contesting the validity of sales of estate property;
>
> 6. Spouse failed to establish that, under Maryland law, she and debtor owned assets of excavating business as tenants by the entireties;
>
> 7. Spouse's counsel committed willful and unethical conduct by bringing state-court action and later by advocating its merits in the bankruptcy court, and sanctions would be imposed against him, along with spouse, jointly and severally in the amount of $66,929.01, which constituted defendants' reasonable costs and attorneys fees.

By way of background, the Plaintiff, Joanne A. Allnutt, was a third-year high school dropout to marry a schoolmate, the Debtor, Fred Allnutt, in 1958. In 1967

Joanne and Fred had started an excavating business with the purchase of a single "Traxcavator" (with lowboy trailer and truck to tow it over the highway), cosigning the original $30,000 loan, and all notes over the years used to buy equipment for the business as it grew. Joanne had worked with her husband until 1981 or 82, throughout that time handling all of the office work, while Fred handled the equipment and obtained excavating contracts (App. 81-85). By 1982 the business had outgrown Joanne's home office, and was taken over by an administrative staff.

The Defendants were a) the purchaser of the excavating property from the bankruptcy estate, Miller and Miller Auctioneers, Inc. and b) certain parties, including Associates Leasing, Inc., known by plaintiff to have purchased some of those assets from Miller and Miller Auctioneers, and who were claiming title to the property. Associates Leasing, Inc. had purchased approximately one-half of the property sold out of bankruptcy estate from Miller and Miller Auctioneers, and were leasing it back to the Mangione group that had purchased the business of JFC (formerly owned by the Debtor) from the bankruptcy estate.

On or about 1982 Fred stopped paying income taxes, and became a "Tax Protestor". In 1992 the Internal Revenue Service seized assets and forced him into Bankruptcy. In the bankruptcy Fred filed numerous motions that were heavily criticized by the Judge.

Plaintiff's counsel had never represented Fred W. Allnutt, and did not know the Allnutts until more than a year after the subject property had been sold out of the bankruptcy estate.

The District Court, by Memorandum and Order, entered September 25, 1998, affirmed the decision of the Bankruptcy Court for the reasons stated in Judge Schneider's March 20, 1998 Opinion. (Memorandum, App. 4-6; Order App. 7-8).

The Court of Appeals by Order entered March 9, 1999 granted motions of Associates Leasing, Inc. for

sanctions in the amount of costs and attorneys fees relating only to the appeal from the district court, granted the motion for an extraordinary writ, and affirmed the judgment of the district court (App. 1-2).

The Court of Appeals, by Order entered April 6, 1999 denied Appellant's Petition for Rehearing and Rehearing En Banc (App. 69-71).

REASONS FOR GRANTING THE WRIT

The Fourth Circuit has apparently decided to vitiate the protections accorded to a spouse as a joint owner of property with a bankrupt which are set forth in 11 U.S.C. §363 (f), (h),(i) and (j) (App. 78-80) if not claimed by the Debtor (husband), and not asserted in an adversary action initiated in the bankruptcy case by the wife.

The protections are further vitiated by the holding that if the Chapter 11 trustee does not know of a co-owner's claim, he is authorized to sell the property, including the co-owner's interest, free and clear of such interest.

Sales of property by a bankruptcy trustee are governed by 11 U.S.C. Section 363 (App. 76-80). Sales of jointly held property are governed by subsections (f) - (j). (App. 78-80). These sections impose requirements on the trustee that he must meet in order to sell a co-owner's interest as a part of the whole. These sections place no requirements or duties on the co-owner.

The statute authorizes sale only if the specified conditions are met. The statute does not authorize the trustee to sell such property if he doesn't know about the co-owner's interest. It is the duty of the trustee to determine what assets the debtor has, before the contracts to sell them.

The Court of Appeals continued to vitiate the protections accorded to a spouse as joint owner of property with a bankrupt by accepting the Bankruptcy court's holding that if both the wife and husband fail to notify the bankruptcy court of their claim of "tenancy by the entireties'

ownership, they have waived their right to such exemptions, and that the failure of a co-owner to object to a trustee's notice of sale has been held to authorize a sale free and clear of all liens and encumbrances and interests, such as the interest claimed here by plaintiff. Veltman, v. Whetzal, 93 F.3d 517 (8th Cir. 1996). (App. 51). This is totally inapposite. In Veltman, both husband and wife were parties before the court. Here plaintiff was never either party or witness. The citation addresses "exemptions" in the bankruptcy case. The Plaintiff's separate interest is not subject to exemption from the debtor's assets. It is an interest that never came into the bankruptcy court in the first place. The filing of the bankruptcy petition in this case created a bankruptcy estate that included "all legal and equitable interests of the debtor in property as of the commencement of the case" 11 U.S.C. §541(a) (App. 50). The plaintiff's claim has nothing to do with the debtor's exemptions of some of his own interests.

The effect of this is that, as much as our "law hates a forfeiture", that a wife, with limited education could be deprived of her undivided assets in her husband's individual bankruptcy (including as here a multi-million dollar estate) because she did not know enough to file in the bankruptcy court an objection to the sale, because she thereby unwittingly is held to have waived her right to her interest in the property – that was not in the bankruptcy estate to start with. The statute (11 U.S.C. §363) puts no requirement on the co-owner to do anything to avoid loss of his or her interest. The interpretation adopted in this case impairs the plain language of the statute that protects the co-owner.

Court of Appeals had denied the plaintiff, a woman, the right to serious consideration of her efforts to recover some or all of her multi-million dollar estate that was taken from her without her ever being a party, or even called as a witness, in any case in which the decisions were made. Her efforts have been trivialized, and she has been sanctioned for

even questioning the validity of what is to her a multi-million dollar legal fraud.

ARGUMENT

Counsel submits that case is valid, and filed in good faith. Analysis of the case is as follows:

OWNERSHIP INTEREST OF JOANNE ALLNUTT

The Affidavit of Joanne Armstrong Allnutt sets forth facts that support the existence or inference of a joint interest, presumably tenancy by the entireties in the Property described in the Complaint, started in 1967, and continuing through to the present time. Cf. M.Lit, Inc. v. Berger, 225 Md. 241 (1961); Alexander v. Hergenroder, 226 Md. 559 (1961).

PLAINTIFF'S INTEREST WAS NOT CONVEYED IN THE BANKRUPTCY SALE

The Code protects the interests of co-owners in tenancy by the entirety by providing that the Trustee must take certain actions before the co-owner's interest can be conveyed, and provides that compensation be paid to the co-owner.

In Sumy v. Scholssberg, 777 F. 2d 921, 924 (C.A.4 (Md.) 1985) the Court of Appeals for the Fourth Circuit summarized the statutory requirements for the sale of property involving concurrent ownership by the trustee as follows:

> Section 363(f) grants the trustee the power to sell most types of estate property "free and clear of any interest in such property of an entity other than the estate, if the estate consents or under certain other

> conditions. (FN4) Section 363(h) then excepts tenancies in common, joint tenancies, and tenancies by the entirety from subsection (f)'s general provisions, providing that the trustee may sell the co-owner's interest along with the estate's interest only in more limited circumstances (FN5). If property is to be sold under Sec. 363(h), the non-bankrupt spouse has a right of first refusal, Sec. 363(i), and if the spouse does not exercise that option, the trustee must of course distribute the proceeds of sale in proportion to the respective interests of the estate and the spouse. (Sec. 363 (j)).

The Code does not place responsibility on the Co-owner to sue the trustee. The trustee must take the required actions for the co-owner's interest to convey.

DEBTOR'S PROPERTY IN THE BANKRUPTCY ESTATE

Upon the commencement of the bankruptcy case, only the debtor's interest in property becomes property of the estate, **and the estate's rights in the property are limited to the rights held by the debtor.** Cross Electric Co., Inc. v. United States. 664 F. 2d 1218 at 1220 (4th Cir. 1981).

The bankruptcy estate's rights in a debtor's property are limited to those rights had by the debtor. Matter of Jones, 768 F.2d 923 (7th Cir. 1985).

It is fundamental that the bankruptcy estate must have an interest in property as of the commencement of the case in order for the bankruptcy trustee to dispose of that interest. The Bankruptcy Trustee may only dispose of the debtor's interest in property which the debtor had as of the commencement of the estate. In re Continental Airlines, Inc. 780 F.2d at 1226 (5th Cir. 1986). See also Sumy v. Schlossberg, 777 F.2d 921 (4th Cir. 1985).

The bankruptcy estate includes whatever property interests the debtor had at the commencement of the case, and that whatever restrictions were placed upon such property rights pre-petition continue to exist post-petition. Creasy v. Coleman Furniture Corp., 763 F. 2d 656 (4th Cir. 1985) Cross Electric Co., Inc. v. United States, 664 F. 2d 1218 (4th Cir. 1981).

The Trustee stands in the same position as the bankrupt, subject to all the liens, claims and equities that existed against the bankrupt. In re Mid-West Tar Products Corp., 150 F. Supp. 163 (U.S. Dist Ct., Dist. Md., 1956) (emphasis supplied); Angeles Real Estate Company v. Kerxton, 737 F.2d 416 (4th Cir. 1984); In re FCX, Inc., 853 F. 2d 1149 (4th Cir. 1988).

There is no question that the Debtor's interest in the Property was conveyed. If the Property is owned in tenancy by the entirety, the Debtor's "present interest" in the property was conveyed. The "present interest" of a Debtor in entireties property was set forth in In re Ford, 3 B.R. 559 (Bankr. D. Md. 1981) to include:

> a. The present right to survivorship in all of the property.
>
> b. The right to one-half the property if tenancy by the entireties is broken by divorce, or voluntary action of both parties.
>
> c. The right to one-half the income from the property.
>
> In re Ford, supra at 566, citing Whitelock v. Whitelock, 156 Md. 115, 143 A. 712 (1928); Masterman v. Masterman, 129 Md. 167, 98 A. 537 (1916)

Under tenancy by the entirety, the trustee had, (and could sell), custody of the Debtor's undivided interest consisting of the same unities, intact and unaltered, as they

existed immediately prior to filing of the petition...In Re Ford 3 B.R. 550, 570 (Bankr. D.Md. 1980). The purchasers therefore would hold custody of the Debtor's rights. Any property that comes into the Debtor's hands flows through him to the Purchasers. But as long as both husband and wife survive and the tenancy is not otherwise broken, the co-owner retains the right to possession of all of the property.

The Court is empowered to authorized the Trustee to sell property held in tenancy by the entirety "only if" the Trustee complied with 11 U.S.C. Section 363(h), (i) and (j). This was not done. Therefore, Plaintiff's interest has not been sold or transferred to anyone by the Trustee. As a consequence, Plaintiff has no claim to the proceeds of the sale of the Debtor's interest, and no claim against the Trustee.

The Trustee has no bankruptcy estate interest to protect. He has sold with Court approval the Debtor's interest in the property. The sale is complete, and ratified (affirmed) by the Court. The Court lacked statutory authority to convey the co-owner's interest in the property because the Trustee had not complied with 11 U.S.C. §363 (h)(i) & (j).

Once the sale was ratified by the Court, the purchaser in conclusively presumed to have agreed to accept whatever title the Trustee could convey. Handlan v. Bennett, 51 F. 2d 21, 24 (4th Cir. 1931). There the Court said:

> [c]aveat emptor applies in all its force to judicial sales and that it will be conclusively presumed that the purchaser agrees to take the title such as it is and that if he permits the sale to be confirmed without objection, he cannot afterward refuse to pay the purchase price because of imperfection of title or for errors of irregularities in the proceedings under which he purchased. This rule prevails in

bankruptcy sales unless the order of sale otherwise provides."

The principle that a sale to a purchaser by a trustee in bankruptcy is on a caveat emptor basis was set forth in In re Brown, 67 B.R. 635 (E.D. Ark., W.D., 1986) as follows:

> Purchaser from trustee in bankruptcy is entitled to absolutely no warranties, other than warranties in trustee's deed.
>
> "A trustee can sell only such title as he has, and – unless he specifically purports to sell more – he is not liable for being unable to convey more than was his in the first instance. * * *"
>
> "In the absence of specific warranty clauses the bankruptcy sale is governed by the rule of 'caveat emptor.' It is for the purchaser to examine in time what is sold and under what conditions. He may not after discovery of a defect covered by the 'caveat emptor' principle refuse payment of the purchase price or claim abatement." 4B Collier on Bankruptcy, ¶ 70.98. p. 1201, n. 15 (14th ed. 1978). * *"
>
> "[T]he applicable law however, holds that actual knowledge of the applicability of bankruptcy rules and governance is immaterial. **"The purchaser at a trustee's sale is bound at his peril to know whether or not the bankruptcy court is proceeding within its jurisdiction in making a sale to him." 4B Collier on Bankruptcy, ¶ 70.98. p. 1201, n. 15 (14th ed. 1978). "It must be**

> **remembered that the doctrine of caveat emptor applies in all its force to judicial sales and that it will be conclusively presumed that the purchaser agrees to take the title such as it is * * *" Id. (emphasis added) * * *"**

See also In re Rigden 795 F.2d 727, 732 (9th Cir. 1986). In re Laughinghouse, 51 B.R.869, 876 (Bankr. E.D.N.C. 1985).

To the extent that the Court of Appeals departs from the foregoing principles to deprive a wife, who had a multi-million dollar interest separate from that of her husband, of her estate, the decision raises questions of discrimination, and introduces conflict among the Circuits.

WAIVER

The finding that Joanne "concealed" her claim of tenancy by the entireties ownership of the property and thereby lost her multi-million dollar claim to the assets is unsupportable. Her interest had never been a part of the subject matter before the Court. Only the Debtor's interest was a part of the bankruptcy estate. It is undisputed that she was at various times in the Courtroom, and at the Office of the Chapter 11 Trustee, available to be summoned as a party or witness, or to answer questions. If silence constituted "waiver", what interest was waived – her multi-million dollar property interest, or her tenancy by the entireties status to allow the husband's one-half interest in the property to be sold.

PRIVITY

It was error to hold that Plaintiff was in privity with Fred Allnutt in the case before Judge Smalkin, decided and entered July 21, 1993 (App. 86-93)

A copy of Judge Smalkin's Judgment and Order is at App. 86-88, and his Memorandum Opinion is at App. 89-93.

Plaintiff, Joanne, was not a party of record, and was not involved as party or witness in the case.

What constitutes privity for purposes of res judicata, and the requirements to establish privity were addressed in Ungast v. Fontaine, 189 Md. 227, and quoted in Douglas v. First Security Federal Savings Banks, Inc., 101 Md. App. (1994), as follows:

> [G]enerally the parties to a suit are those persons who are entered as parties of record. But for purposes of the application of the rule of res judiciata the term "parties" includes all persons who have a direct interest in the subject matter of the suit, and have the right to control proceedings, make defense, examine the witnesses and appeal if an appeal lies. So where persons although not formal parties of record, have a direct interest in the suit and in the advancement of that interest take open and substantial control of its prosecution, or if they are so far represented by another that their interests receive actual and efficient protection, any judgment recovered therein is conclusive upon them to the same extent as if they had been formal parties.

Measured against the foregoing criteria, Plaintiff was not in "privity" with any party to the earlier litigation.

(1) The Plaintiff was not a party of record to either the District Court litigation, nor to the Bankruptcy. The Trustee could only sue for the Debtor's interest in the property, not the Plaintiff's.

Plaintiff's interest was not so far represented by another that her interests receive actual and efficient protection. In the District Court action, the interests of the Fred Allnutt and the children in trying to uphold the sham trusts was adverse to Plaintiff's.

c. In the Bankruptcy case, the interests of all parties -- Trustee, purchaser and creditors -- were adverse to Plaintiff's.

RES JUDICATA

The factual predicate for re judicata (claim preclusion) to apply was set out in Douglas v. First Security Federal Savings Bank, Inc., 101 Md. App. 170, 181 (1994), quoting Major v. First Virginia Bank, 97 Md. App. 520, 533-34 631 A. 2d 127 (1993). The Court said:

> Under Maryland law the requirements for res judicata or claim preclusion are: 1) that the parties in the present litigation are the same or in privity with parties to the earlier dispute, 2) That the claim presented in the current action is identical with the one determined in the prior adjudication, and 3) That there was a valid final judgment on the merits. * * * All three elements must be present for the final judgment in the first claim to bar the second claim.

As to Joanne Allnutt, the instant case fails all three elements set forth above. The requirements for privity for

purposes of res judicata to ban the second suit were not met, as shown above. The claim presented here is not identical with the claims before Judge Smalkin in the District Court.

COLLATERAL ESTOPPEL

The requirements for collateral estoppel to apply are not present here as to Joanne Allnutt.

The factual predicate for collateral estoppel to apply was set out In O'Reilly v. County Board of Appeals for Montgomery County, Maryland, 900 F. 2d 789, 791 (4th Cir. 1990). The Court stated that under Maryland law, collateral estoppel, or issue preclusion, applies only if it established that:

> (1) the issue decided in the prior adjudication is identical to the issue in the present action,
>
> (2) there was a prior final judgment on the merits, and
>
> (3) the party against whom the decision is being used **was a party in the prior action.** MPC, Inc. v. Kenny, 279 Md. 29, 35, 367 A.2d 486, 490-491 (1977)

The Court further stated that absent a clear identity of issues, the Plaintiff should not be estopped.

The evidentiary facts needed to support the present complaint are those that show that the property used in the business was owned by the Plaintiff and the Debtor, husband and wife, as tenants by the entireties. None of the evidence in the "District Court litigation" has any bearing on the issues here.

Thus there was no – privity, and both res judicata and collateral estoppel are inapposite in this case. There was no identity of parties; the "privity" of Plaintiff solely by reason of being married to the Debtor does not give the Debtor the

independent right to surrender the wife's ownership interests in tenancy by the entirety property in the District Court litigation; there was no identity of cause of action, nor of the evidentiary facts needed for the current litigation compared to the earlier litigation.

CONCLUSION

The Petitioner prays that the award of sanctions be set aside; that the decision be reversed; and that the matter be remanded to the Circuit Court for Howard County, Maryland for further proceedings.

Dated: July 6, 1999

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